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COMMENT

SECTION 14(b) AND *Communication Workers v. Western Electric Co.*: AN END RUN AROUND PREEMPTION

INTRODUCTION

It is a widely accepted principle of federalism that Congress has almost entirely preempted¹ the field of labor law. Preemption developed rapidly in this area after Congress adopted the Taft-Hartley Amendments to the National Labor Relations Act² in 1947. One of the most significant of these amendments is section 14(b)³—a partial exception to the general rule of preemption—which expressly permits individual states to enact legislation prohibiting union-security agreements.⁴ In those states which

¹ The preemption doctrine, based on the supremacy clause in art. VI, § 2 of the United States Constitution, results in federal law superseding and displacing incompatible state law. See *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). For a series of articles examining the development of the preemption doctrine in the labor field see Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972).

² 49 Stat. 449, as amended by 61 Stat. 136, 73 Stat. 519 and 88 Stat. 395, 29 U.S.C. § 141 et seq. (1970).

³ Section 14(b) provides:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b) (1970).

⁴ The term "union-security" describes a variety of arrangements, usually contractual, whereby union membership [or the payment of the equivalent of union dues] is made a condition of employment. The traditional types of clauses include: (1) the closed shop, which permits the hiring only of members of the appropriate union [this type of clause is now illegal in the United States]; (2) the full union shop, under which all employees must join the union within a certain period, typically within 30 days of hiring; (3) the modified union shop, which allows new members to withdraw from membership at stated periods, or exempts old employees who are not members; (4) maintenance of membership, which imposes no membership requirement, but does require employees who join the union to continue their membership; and (5) the agency shop, which requires non-union employees

have not prohibited such agreements, union-security contracts are permitted by section 8(a)(3) of the federal act.⁵

The question was recently raised before the Colorado Supreme Court of whether this authority ceded to the states by section 14(b) is limited to flatly prohibiting union-security agreements or whether the section allows states to regulate such agreements in other ways. In *Communication Workers v. Western Electric Co.*,⁶ the Colorado Supreme Court construed section 14(b) in conjunction with the Colorado Labor Peace Act (CLPA).⁷ The court held that the State of Colorado could *regulate* (as well as forbid) union-security clauses by requiring a referendum in which three-fourths of those employees voting must approve negotiation of such a security agreement before it is legal. More significantly, the court upheld that portion of the Colorado statute which, in the process of regulating such agreements, affects the procedure by which recognized bargaining units are determined: The statute specifies that, in order for members of a bargaining unit to be eligible to vote in a union-security authorization referendum, the bargaining unit itself must have been deter-

to pay to the union a sum equal to fees and dues paid by members.

Henderson, *The Confrontation of Federal Preemption and State Right-to-Work Laws*, 1967 DUKE L.J. 1079, 1082 n.13.

⁵ *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement

29 U.S.C. § 158(a)(3) (1970). The Colorado Supreme Court incorrectly stated in *Communication Workers* that this section, which now in effect prohibits the closed shop, "disclaimed a national policy hostile to the closed shop" 551 P.2d at 1078.

⁶ 551 P.2d 1065 (Colo. 1976), *appeals dismissed*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977).

⁷ COLO. REV. STAT. §§ 8-3-101 *et seq.* (1973). In *Communication Workers*, the Colorado Supreme Court cited to the 1963 Colorado Revised Statutes. This comment, however, will cite only to the 1973 codification. For a history of the CLPA see H. SELIGSON & G. BARDWELL, *LABOR-MANAGEMENT RELATIONS IN COLORADO* 139-52 (1961).

mined by means of an election.⁸ The court's decision appears to raise serious questions of federal-state conflict because the National Labor Relations Board, which has been granted sole authority to determine units for general collective bargaining purposes,⁹ does not necessarily require or even always allow an election to be held for determining the appropriate unit.

Following the decision by the Colorado Supreme Court, *Communication Workers* was appealed to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question.¹⁰ This comment will discuss two issues raised by *Communication Workers* which could have been confronted by the Supreme Court on appeal:¹¹ (1) Is Colorado's authority under section 14(b) limited to prohibiting union-security clauses; or does it include the power to regulate such clauses by requiring employees to authorize negotiation of the clause by a three-quarters affirmative vote? (2) May Colorado regulate the determination of appropriate units for general collective bargaining purposes; if not, does section 14(b) authorize Colorado to regulate unit determination for the specific purpose of defining the group of employees who will vote in the union-security authorization referenda?

I. *Communication Workers v. Western Electric Co.*

The provision of the Colorado Labor Peace Act requiring a

⁸ This unit election is to be conducted by the Colorado Division of Labor, COLO. REV. STAT. § 8-3-107(2) (1973), though COLO. REV. STAT. § 8-3-104(10) (1973) provides that an election conducted by "any tribunal having competent jurisdiction" will also be recognized. Presumably the NLRB has competent jurisdiction within the meaning of the section.

⁹ *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947).

¹⁰ This type of dismissal is a decision on the merits. The precedential weight of this decision is not entirely clear, although a recent case appears to bind lower courts until the Supreme Court indicates otherwise. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). Elsewhere, in an extensive dissent, Mr. Justice Brennan has pointed out the danger of placing such weight on a summary disposition. *Colorado Springs Amusements, Ltd. v. Rizzo*, 96 S. Ct. 3228 (1976) (dissenting from the denial of a petition for a writ of certiorari).

¹¹ Other issues in *Communication Workers* which will not be discussed here include: (1) the definition of an "all-union agreement," COLO. REV. STAT. § 8-3-104(1) (1973); (2) whether the agreements in issue are "all-union agreements"; and (3) whether the referendum and collective bargaining unit requirements were intended by the state legislature to cover only those employers whose business affects intrastate commerce or also those employers, such as the appellee-defendants, who are engaged in interstate commerce.

referendum to authorize a union-security agreement has not been widely followed since its adoption in 1943.¹² Given traditional management opposition to union-security agreements, it is surprising that the first court challenge to agreements executed in the absence of such a referendum did not come until recently.

There was no factual controversy in *Communication Workers*. It was stipulated that the National Labor Relations Board had recognized the Communication Workers as the exclusive bargaining agent for the employees of the appellee-employers in several states. Secret ballot elections to determine the appropriate bargaining units¹³ or their representatives¹⁴ had not been held by either the NLRB or the Colorado Division of Labor. In addition, the union-security referenda required under the CLPA¹⁵ had not been conducted. Nevertheless, the employers voluntarily entered into several collective bargaining agreements with the Communication Workers. Each of these agreements contained either a modified agency shop or a modified maintenance-of-membership clause,¹⁶ which required, as a condition of continued employment, the payment of union dues. The agreements provided an escape period, however, during which current employees could divest themselves of the obligation to pay dues. Those who did not so act during the escape period were obligated to continue paying dues; if they subsequently failed to pay dues, the union

¹² See note 89 *infra*.

¹³ Under the authority granted to the NLRB by 29 U.S.C. § 159(b) (1970), the Board has discretion to determine the appropriate unit by elections or other means. In *Mallinckrodt Chem. Works, Uranium Div.*, 162 N.L.R.B. 387 (1966), the Board set forth the guidelines it would follow in determining whether or not to hold an election. See note 50 *infra*. For a discussion of unit determination post-*Mallinckrodt* see J. ABODEELY, *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 94-112 (1971); Cohen, *Two Years Under Mallinckrodt: A Review of the Board's Latest Craft Unit Policy*, 20 LAB. L.J. 195 (1969). For a discussion of pre-*Mallinckrodt* policy see Note, *Labor Law—Determination of Appropriate Bargaining Unit*, 1960 WIS. L. REV. 683. See also Samoff, *Law School Education in NLRB Representation Cases*, 21 LAB. L.J. 691 (1970).

¹⁴ In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court upheld the authority of the NLRB to issue bargaining orders to an employer who had committed unfair labor practices "which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." *Id.* at 610. Thus, an employer may have to recognize the union as the representative of its employees even without a representation election. See generally R. WILLIAMS, P. JAMES, & K. HUNN, *NLRB REGULATION OF ELECTION CONDUCT* (1974).

¹⁵ COLO. REV. STAT. § 8-3-108(c) (1973).

¹⁶ See note 4 *supra*.

could, under the terms of the agreements, compel the employer to discharge them. The dispute arose when the employers refused to dismiss employees who ceased payment of their dues after the escape period. The employers contended that the union-security clauses¹⁷ were invalid for lack of compliance with the CLPA.

The CLPA provides that it is an unfair labor practice for an employer to

[e]ncourage or discourage membership in any labor organization . . . by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director [of the Colorado Division of Labor].¹⁸

¹⁷ The term "all-union agreement," COLO. REV. STAT. § 8-3-104(1) (1973), as it was used in *Communication Workers*, is synonymous with the better known term, "union-security agreement." It should be noted, however, that the Communication Workers vigorously argued that "all-union agreements" as defined by the CLPA were limited to closed shop agreements, which were legal under federal law prior to the Taft-Hartley amendments adopted in 1947, and that lesser agreements, such as an agency shop, were not included in this definition and thus were not subject to the referendum requirement. The Wisconsin Supreme Court, in *International Union, UAW v. Wisconsin Employment Relations Bd.*, 245 Wis. 417, 429, 14 N.W.2d 872, 878-79 (1944), construed that state's referendum requirements for all-union agreements, Wis. STAT. ch. 57, § 111.06(1)(c) (1939), as amended Wis. STAT. § 111.06(1)(c)1 (Supp. 1.01 1976-77), in conjunction with 29 U.S.C. § 158(a)(3) (1970) and held that "all-union agreements" applied only to those agreements that required all employees in the bargaining unit to be members of the union. *But see* *Public Serv. Co.*, 89 N.L.R.B. 418, 420-24 (1950). The definition of an "all-union agreement" in Wisconsin at that time, Wis. STAT. ch. 57, § 111.02(9) (1939), as amended Wis. STAT. § 111.02(9) (1974), referred to "all of the employees in such unit" as does the present Colorado statute, COLO. REV. STAT. § 8-3-104(1) (1973). Prior to *Communication Workers* the Colorado Division of Labor interpreted, as did the Wisconsin court, "all-union agreements" as referring only to union-shop clauses. A maintenance-of-membership agreement, for instance, does not require all employees to be members of the union. Therefore, referenda were not required by the Division of Labor to authorize agency-shop or maintenance-of-membership clauses. Interview with Robert Frey, Labor Mediator with the Colorado Division of Labor, in Denver, Colorado (Oct. 22, 1976) [hereinafter cited as Second Frey Interview]. Since most of the collective bargaining contracts in Colorado contain these latter types of union-security agreements, *id.*, rather than union-shop clauses, few referenda were required by the Division.

¹⁸ COLO. REV. STAT. § 8-3-108(c) (1973) (emphasis added). There has been no judicial opinion in Colorado on whether this section requires a three-quarters vote of all employees in the unit or whether it requires approval of only three-quarters of those voting. The Colorado Attorney General has issued an opinion stating that only a three-quarter majority among those actually voting is required. [1949-50] COLO. ATTORNEY GEN. BIENNIAL REPORT 94.

In upholding the employers' refusal to discharge non-paying employees, the Colorado Supreme Court affirmed the trial court's ruling¹⁹ that (1) the statute applies to employers engaged in interstate as well as intrastate commerce; (2) the union-security clauses in question fall within the Colorado definition of all-union agreements;²⁰ and (3) section 14(b) permits states to regulate²¹ (as well as forbid) union-security clauses by requiring an authorization referendum. The Colorado Supreme Court also held, however, that determination of the appropriate collective bargaining unit²² by secret ballot election is "a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law."²³ While the court recognized that this unit, determined under Colorado law for the specific purpose of a union-security referendum, might be different from the general purpose collective bargaining unit determined by the NLRB,²⁴ it found Colorado's regulation of unit determination to be "merely an incident"²⁵ of the authority ceded to the state by section 14(b).

Unit determination for *general* collective bargaining purposes has been preempted from the states.²⁶ The Colorado Supreme Court, however, has carved out an exception to this policy,

¹⁹ *Communication Workers v. Western Elec. Co.*, 88 L.R.R.M. 3481 (Dist. Ct. Denver 1974), *aff'd*, 551 P.2d 1065 (Colo. 1976), *appeals dismissed*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977).

²⁰ COLO. REV. STAT. § 8-3-104(1) (1973). See note 17 *supra*.

²¹ *Accord*, *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949). See text accompanying notes 29-41 *infra*.

²² A collective bargaining unit in Colorado is defined as:

an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.

COLO. REV. STAT. § 8-3-104(4) (1973).

²³ 551 P.2d at 1076.

²⁴ *Id.* at 1079.

²⁵ *Id.*

²⁶ *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947).

with the apparent approval of the United States Supreme Court,²⁷ by holding that the state has authority to determine the appropriate unit for the *specific* purpose of union-security referenda.²⁸

II. STATE REGULATION OF UNION-SECURITY CLAUSES

The Colorado Supreme Court's interpretation of section 14(b) is supported, in part, both by a United States Supreme Court decision, and by a reading of the legislative history surrounding the adoption of the Taft-Hartley amendments. The text of section 14(b) provides:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is *prohibited* by State or Territorial law.²⁹

In the absence of state legislation authorized by this section, unions are free to negotiate union-security agreements once they are recognized as exclusive bargaining agents.³⁰ Employers, of course, are not required to agree to include such clauses in the collective bargaining contract. In the so-called "right-to-work" states, however, legislation has been enacted under section 14(b) that prohibits union-security agreements, even if both employers and unions wish to include such clauses in their collective bargaining contracts. Colorado's statute as interpreted takes a middle position. The CLPA permits union-security agreements *but* only after two elections: the first to determine the bargaining unit; and the second, a referendum, in which three-quarters of the voting employees of the unit to be covered by the union-security

²⁷ *Communication Workers v. Western Elec. Co.*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977). The Board also argued against allowing Colorado to determine bargaining units for specific union-security purposes. Brief for NLRB as Amicus Curiae at 9-11, *Communication Workers v. Western Elec. Co.*, *supra*. Portions of the NLRB's brief are quoted at note 55 *infra*.

²⁸ 551 P.2d at 1078, 1079. The Colorado Supreme Court specifically pointed out that the unit determined by the state was only for the purpose of an all-union referendum. *Id.* Nowhere in the CLPA, however, is there such a limitation of the purposes for which a state unit is chosen.

²⁹ 29 U.S.C. § 164(b) (1970) (emphasis added).

³⁰ 29 U.S.C. § 158(a)(3) (1970).

agreement must affirmatively approve the negotiation of such an agreement.³¹

The latter aspect of this two-step process, the referendum, appears to be compatible with section 14(b): The CLPA is patterned after the Wisconsin Employment Peace Act³² which was upheld by the Supreme Court in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*.³³ One of the primary issues in *Algoma* was whether the NLRB's certification of a unit representative "ousted" the state from regulating remedies for violations of the state's union-security statute. In *Communication Workers* the union argued³⁴ that the language in *Algoma*³⁵ upholding the right of a state to regulate under section 14(b) was vague. Specifically, it was urged that *Algoma*'s holding concerned only the state's right to enforce a remedy against an employer who sought to give effect to a union-security clause that was illegal under state law. Had the Colorado Supreme Court accepted this narrow interpretation, *Algoma* would not have been considered dispositive of the referendum issue in *Communication Workers*.³⁶

The union's reading of *Algoma* is not supported, however, by an examination of the briefs submitted in that case which indicate that the regulation-by-referendum issue was adequately argued by both sides.³⁷ Since the Court was presented with this

³¹ COLO. REV. STAT. § 8-3-108(c) (1973). See note 18 *supra*.

³² WIS. STAT. ch. 57, § 111.06(1)(c) (1939), as amended WIS. STAT. § 111.06(1)(c)1 (Supp. 1.01 1976-77). The Wisconsin all-union referendum requirement was amended in 1975 so that unions certified by elections conducted by the Wisconsin Employment Relations Board or the NLRB could negotiate and execute "all-union agreements" without an authorizing referendum. However, unions that are voluntarily recognized by the employer must still receive authorization through a referendum before entering into such an agreement.

³³ 336 U.S. 301 (1949).

³⁴ Brief for Appellant Communication Workers at 27, Reply Brief for Appellant Communication Workers at 11-14, *Communication Workers v. Western Elec. Co.*, 551 P.2d 1065 (Colo. 1976).

³⁵ 336 U.S. at 314-15.

³⁶ See *Local 34, Int'l Molders*, 150 N.L.R.B. 913 (1965); *Cyclone Sales, Inc.*, 115 N.L.R.B. 431 (1956); *Safeway Stores, Inc.*, 81 N.L.R.B. 387 (1949); *Northland Greyhound Lines, Inc.*, 80 N.L.R.B. 288 (1948); *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791 (1948). But see *Western Elec. Co.*, 84 N.L.R.B. 1019 (1949). These Board interpretations of section 14(b), which are vague and inconsistent, are only persuasive and not binding on a court. See *Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

³⁷ Respondent Wisconsin Employment Relations Board relied on the legislative his-

issue, the decision should be read in that light.³⁸ Further, as the following indirect reference indicates, the Supreme Court did implicitly sanction the Wisconsin referendum requirement:

It is argued, however, that the effect of this section [14(b)] is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, which *under the circumstances* "is prohibited" by the State, the legislative history of the section would dispel it.³⁹

The "circumstances" noted by the Court, under which application of a union-security clause was prohibited, stemmed from the union-security referendum, which then required a two-thirds affirmative vote. The union-security agreement in question had not been authorized by such a referendum and thus was illegal under Wisconsin law.

The legislative history of the Taft-Hartley Act also supports the argument that states may, under 14(b), regulate union-security agreements by requiring referenda.⁴⁰ Both the Wisconsin and Colorado statutes were in effect and were considered by Congress when it enacted section 14(b).⁴¹ Indeed, it appears that this

tory of section 14(b), Brief for Respondent at 6-14, *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949), which supports the view that section 14(b) sanctions not only those state policies which prohibit union-security agreements but also those which are more restrictive than federal law. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 9, 34, 44 (1947); H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947); 93 CONG. REC. 7503 (1947) (President Truman's veto message); 93 CONG. REC. 6665-66 (1947) (analysis of bill by Senator Murray); 93 CONG. REC. 6613, 6678 (1947) (remarks of Representative Landis). For a judicial interpretation of the legislative history of section 14(b) see *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 98-105 (1963); *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 314 (1949). In *Algoma* the petitioners argued, however, that there should not be a resort to Congressional debate and hearings when the statute is clear on its face. Brief for Petitioner at 8-16, Reply Brief for Petitioner at 10-12, 14, *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949).

³⁸ "[T]hat [this issue] was considered by the [C]ourt must be assumed; it was referred to and discussed in each of the briefs presented." *Dostal v. Magee*, 273 Wis. 228, 231, 77 N.W.2d 604, 606-07 (1956); accord, *Bingham v. United States*, 296 U.S. 211, 218-19 (1935).

³⁹ 336 U.S. at 314 (emphasis added).

⁴⁰ See legislative history cited in note 37 *supra*.

⁴¹ H.R. REP. NO. 245, 80th Cong., 1st Sess. 34 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947).

section was inserted to clarify Congress' intent that such statutes not be preempted by federal law. Therefore, section 14(b) does not seem to preclude states from requiring union-security referenda.

III. THE COLLECTIVE BARGAINING UNIT

A. *The Colorado "Unit"*

The *Algoma* decision appears to authorize state mandated union-security clause referenda. One question which was *not* raised in *Algoma*, however, was whether the state could also "regulate" the appropriate unit in which the referendum was to be conducted. In *Communication Workers*, the Colorado Supreme Court interpreted the referendum requirement under the CLPA as being closely, if not inextricably,⁴² tied to a determination of the appropriate collective bargaining unit. The court held that the CLPA mandates, as a prerequisite to the referendum, a secret ballot election to determine the bargaining unit.⁴³

The court did not, however, specify exactly what was intended by the term "collective bargaining unit." To add further confusion, the definition of such a "unit" under the Colorado statute is ambiguous.⁴⁴ Usually, the term "unit" refers to the group of employees to be represented, not to the representative agent of that group. The unit might include the employees in an entire plant; or there may be several units within a single plant, each unit consisting of employees from separate crafts, divisions, or departments, and each unit having a different representative agent. The CLPA seems to confuse the concept of a unit with that of the representative agent of that unit,⁴⁵ and the Colorado Su-

⁴² "Nor can an essential part of an act, which colors the whole, be stricken as invalid and the remainder sustained." *City & County of Denver v. Lynch*, 92 Colo. 102, 108, 18 P.2d 907, 910 (1932).

⁴³ See note 51 *infra*.

⁴⁴ See discussion in note 46 *infra*.

⁴⁵ COLO. REV. STAT. § 8-3-104(4) (1973). The determination of the representative agent, usually a union, has also been preempted from the states:

The federal Board's machinery for dealing with certification problems also carries implications of exclusiveness. Thus, a State may not certify a union as the collective bargaining agent for employees where the federal Board, if called upon, would use its own certification procedure.

Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 476 (1955). The Colorado requirement would

preme Court does not clearly indicate which of these concepts it is using.⁴⁶ Despite its imprecision, however, the court seems to have been referring, as a practical matter, to the unit as the

also appear to conflict with 29 U.S.C. § 158(a)(3)(i) (1970), which only allows an employer to enter into a union-security agreement with a labor organization which is determined as the representative of the employees as provided in 29 U.S.C. § 159(a) (1970).

⁴⁶ The different interpretations of what a "unit" refers to in the CLPA were presented to the court. While the Communication Workers maintain that a "unit" is the group of employees to be represented, the Teamsters Union, in an amicus brief, argued with some hesitancy that a "unit" in Colorado is the representative union. Brief for Colorado-Wyoming Joint Council of Teamsters No. 54 as Amicus Curiae at 14, *Communication Workers v. Western Elec. Co.*, 551 P.2d 1065 (1976).

When the Colorado Supreme Court compares "certification or recognition under the Federal Act" with the "recognition/definition section" of the CLPA, 551 P.2d at 1077, it does not refer to *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949), or *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947), both of which directly concern the preemption of unit determination. Instead, the court refers to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-97 (1969), which deals primarily with the validity of NLRB orders instructing employers to bargain with the union as the exclusive representative of the unit. 551 P.2d at 1077. The question of the unit as the group of employees to be represented was not at issue in *Gissel*. A more appropriate comparison could have been made with *Mallinckrodt Chem. Works, Uranium Div.*, 162 N.L.R.B. 387 (1966). Thus, while the Colorado Supreme Court did not explicitly state which interpretation of a collective bargaining unit it accepted, if either, the citation of *Gissel* would seem to indicate an implicit acceptance of a Colorado unit as referring to the representative agent itself. The more likely explanation, however, in view of the general meaning that usually attaches to the term "unit," is that the court was just imprecise in its choice of citations.

In examining the different sections of the CLPA it becomes apparent that the statute does not clearly indicate what constitutes a Colorado unit. Among the various descriptions are the following: (1) "'Collective bargaining unit' means an *organization* selected by secret ballot." COLO. REV. STAT. § 8-3-104(4) (1973) (emphasis added); (2) "A *unit* chosen for the purpose of collective bargaining *shall be the exclusive representative* of all of the employees in such unit . . ." COLO. REV. STAT. § 8-3-107(1) (1973) (emphasis added); (3) A "'[r]epresentative' includes any person who is the duly authorized agent of a collective bargaining unit." COLO. REV. STAT. § 8-3-104(17) (1973); (4) A "'[p]erson' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers." COLO. REV. STAT. § 8-3-104(16) (1973). These sections of the CLPA confuse the distinction between the group of employees to be represented, the unit, and the representative agent, usually the union. Furthermore, a comparison of the parallel sections of the Wisconsin Employment Peace Act upon which the CLPA was modeled indicates that the Colorado Legislature did not create these distinctions, as did the Wisconsin Legislature, and used the term "unit" to refer to both a group of employees and a representative agent. Compare COLO. REV. STAT. §§ 8-3-107(1)-(4) (1973) with Wis. STAT. §§ 111.05(1)-(4) (1974). Since the court has not clarified this point, the CLPA should be amended to avoid further confusion. The Colorado Division of Labor, however, had apparently, in administering the CLPA, differentiated these concepts prior to *Communication Workers*, despite the statute's ambiguity. Interview with Robert Frey, Labor Mediator for Colorado Division of Labor, in Denver, Colorado (Sept. 8, 1976) [hereinafter cited as First Frey Interview].

group of employees.⁴⁷ By construing the CLPA to require a secret ballot election to determine the bargaining unit, if that unit is to be recognized for the purpose of negotiating a union-security agreement, the court appears to have raised a serious question as to whether there is a substantial conflict between state and federal law on unit determination.

B. *Unit Determination and the Preemption Question*

The issue of preemption arises because of the possibility that the procedures followed by the NLRB and the election conducted by the Colorado Division of Labor could result in the recognition of different bargaining units.⁴⁸ The NLRB does not always require, or even always allow, elections for unit determination;⁴⁹ the Board has discretion to decide when to allow a unit determination election.⁵⁰ The Colorado Supreme Court's interpretation of the

⁴⁷ Since the Division of Labor has traditionally treated a "unit" as the group of employees to be represented, had the court intended to affect this practice and accept the Teamsters' suggestion that the CLPA might actually be referring to the representative union when using the term "unit," a more explicit statement of such would have been expected. See note 46 *supra*.

⁴⁸

When it is clear or *may fairly be assumed* that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (emphasis added).

When an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245 (emphasis added).

⁴⁹ See note 13 *supra* and note 50 *infra*.

⁵⁰ 29 U.S.C. § 159(b) (1970). In *Mallinckrodt Chem. Works, Uranium Div.*, 162 N.L.R.B. 387 (1966), a craft severance unit election was not permitted, since the Board held that a separate craft unit would not be appropriate. This type of unit election, known as a "Globe election," *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294 (1937), allows the employees to decide whether they want a union that represents the larger, more inclusive unit, or whether they want the smaller, more fragmented units. The Board will allow such an election only if it feels that either choice would be appropriate for collective bargaining purposes. In its decision in *Mallinckrodt* the Board set forth several factors that it would consider in determining whether a unit was appropriate, and, therefore, whether a unit election would be permitted:

1. Whether or not the proposed unit consists of a distinct and homogenous

CLPA would require a secret ballot election in all unit determination situations as a prerequisite to the unit's negotiation of an enforceable union-security agreement. The court said:

Inasmuch as no secret ballot election was conducted *for the purpose of establishing a collective bargaining unit* authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to enforcement of the all-union agreements provisions which are, in our opinion, invalid. *Even if such an election had been held and an appropriately authorized collective bargaining unit had been established*, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum.⁵¹

Because of the dissimilarity between the policies underlying the federal and state procedures, the resulting units could arguably be different. To illustrate, the NLRB must frequently balance

group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in the broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.

162 N.L.R.B. at 397.

⁵¹ 551 P.2d at 1076 (emphasis added). Prior to this decision, the Colorado Division of Labor had not required a secret election to determine the appropriate unit unless there was a dispute as to what the unit should be. The effect of this decision is to require such an election as a condition precedent to the holding of all union-security referenda. Brief for Appellant Colorado Division of Labor at 7, *Communication Workers v. Western Elec. Co.*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977); First Frey Interview, *supra* note 46. In the absence of a dispute as to the appropriateness of the unit, however, it is not entirely clear what issue such a secret election would be intended to resolve.

the policy of seeking stable labor-management relations, which is more often than not advanced by having a small number of larger units with which the employer must negotiate, against the employees' freedom to choose a smaller unit, which might represent a particular craft, department, or division. Generally, the Board disfavors fragmentation and larger units are thus preferred.⁵² Under the CLPA, however, there is a strong policy favoring the smaller unit, as is evidenced by the mandatory craft severance election held in conjunction with any unit determination election.⁵³ Should Colorado recognize a unit different from that recognized by the NLRB, even if only for the limited and specific purpose of conducting a union-security referendum, employers would be compelled to negotiate with the same employees as members of different bargaining units for different purposes. This situation creates the very confusion which Board certification was, in the interest of preventing industrial strife, designed to avoid.

The United States Supreme Court outlined the reasons for federal preemption of the unit determination question in *Bethlehem Steel Co. v. New York State Labor Relations Board*.⁵⁴

Thus, if both [the state and federal] laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with different ones as they have in the past. . . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. . . . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations *in general*. . . . We do not believe this leaves room for the operation of the state authority asserted.⁵⁵

⁵² Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 CASE W. RES. L. REV. 479, 531-39 (1967).

⁵³ *Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 37, 360 P.2d 446, 449 (1961). When a craft requests severance from the larger unit, the NLRB may or may not grant a Globe election. See note 50 *supra*. However, under the CLPA the Colorado Division of Labor has no such discretion. Once a craft severance election is requested, it must be conducted by the Division. COLO. REV. STAT. § 8-3-107(2) (1973).

⁵⁴ 330 U.S. 767 (1947).

⁵⁵ *Id.* at 775-76 (emphasis added). The Board has also pointed out the potential

Against this background, it is difficult to justify the Colorado Supreme Court's holding that the state and the federal government can exercise concurrent power to determine the appropriate unit for the same group of employees. To answer this query by saying that Colorado's determination is limited and not general is to beg the more basic question of whether or not Colorado's intrusion into this area creates the potential for confusion and discord which the policy of federal preemption is designed to avoid.

conflicts which may result from the Colorado unit determination requirement:

It is also possible that the state units would include individuals who are not included in the Board unit. The state director is empowered to "determine which persons shall be qualified and entitled to vote at any election held by him" (C.R.S. 1973 Section 8-3-107(5)). Contrary to Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), the Labor Peace Act does not preclude the inclusion of plant guards in the same unit with other employees. And, while the Labor Peace Act appears to exclude supervisors from the definition of "employee" (C.R.S. 1973 Section 8-3-104(11)(a)), it does not contain a definition of "supervisors" comparable to that in Section 2(11) of the NLRA, 29 U.S.C. 152(11).

Brief for NLRB as Amicus Curiae at 7-8 n.6, *Communication Workers v. Western Elec. Co.*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977).

If the Colorado unit included individuals not in the Board unit, it is possible that a union security provision could be rejected as the result of the vote of individuals whom the union, insofar as the NLRA was concerned, did not represent. On the other hand, should a union security provision be approved in such unit, the union would be compelled, insofar as state law was concerned, to represent those individuals in negotiations over union security. Cf. C.R.S. 1973 Section 8-3-108(c)

Id. at 9 n.9.

The first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), permits the discharge of an employee for failure to pay union dues as required by a union security agreement only "if [the union] is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made ***." Accordingly, an employer would violate Section 8(a)(3), and a union Section 8(b)(2), 29 U.S.C. 158(b)(2), of the NLRA by enforcing a union security agreement covering a bargaining unit other than that approved by the Board under Section 9 of the Act. Such violation is particularly likely to occur when the agreement covers a unit that is clearly inappropriate under the NLRA because it contains individuals, such as supervisors, who are statutorily excluded from Section 9 units. . . . On the other hand, should an employer or union attempt to apply a union security arrangement covering the Board-approved unit, rather than the state-approved union security unit, they would, under the decision below, violate the Labor Peace Act (see C.R.S. 1973 Section 8-3-108(1)(c), (2)(b)).

Id. at 10-11 (footnote omitted).

The Colorado Supreme Court's interpretation of the CLPA was not the court's only alternative. In its conflict of provisions section, the CLPA provides:

Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.⁵⁶

If the court had held the question of unit determination was preempted by federal law, this section would have substituted the federal method of unit determination for that provided in the CLPA.⁵⁷ Most of the conflict between the state and federal statutes concerning the determination of the appropriate bargaining unit would have been avoided. The unit determined by the NLRB would still have been required to comply with the CLPA's referendum before it could negotiate a union-security agreement, which, in any event, is the more important consideration from Colorado's point of view. The court did not, however, choose this interpretation, and its reading of the statute⁵⁸ is a final interpretation of state law.⁵⁹

⁵⁶ COLO. REV. STAT. § 8-3-120 (1973).

⁵⁷ It is clear that the determination of the collective bargaining [unit] within which the referendum is to be conducted is made by the Division of Labor. If . . . election for a collective bargaining unit is preempted and, therefore, falls under the jurisdiction of federal law, the argument is easily answered in those instances where an appropriate bargaining unit has been determined either through certification or voluntary recognition under the provision of the National Labor Relations Act. The director must conduct the referendum within the unit established.

Answer Brief for Appellee Mountain States at 15, *Communication Workers v. Western Elec. Co.*, 551 P.2d 1065 (Colo. 1976). There still may be problems, however, with attempting to conduct a referendum in an NLRB-recognized unit, when that unit cuts across state boundaries:

[T]he bargaining unit established in accordance with federal law may be inconsistent with that required by state regulation. Though the unit for the Michigan strike vote cannot extend beyond the State's borders, the unit for which appellant union is the federally certified bargaining representative includes Chrysler plants in California and Indiana as well as Michigan. . . . Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. A state statute so at war with federal law cannot survive.

UAW v. O'Brien, 339 U.S. 454, 458-59 (1950). *But see* *Western Elec. Co.*, 84 N.L.R.B. 1019 (1949).

⁵⁸ COLO. REV. STAT. § 8-3-104(4) (1973).

⁵⁹ *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

C. *The Scope of Section 14(b)*

The Colorado Supreme Court was aware of the preemption issues raised by its holding that the state could make a unit determination decision which might not be in accord with that reached by the NLRB. However, in an end run of this question, the court held that the state's authority to determine units in which union-security referenda could be conducted is "merely an incident of the state's power to prohibit the application of union-security agreements under the permissive grant of authority contained in § 14(b)."⁶⁰ The court offers no authority or justification for this conclusion other than its own interpretation of state powers under section 14(b).

The most explicit statement by the United States Supreme Court on the scope of state powers under section 14(b) came in *Retail Clerks v. Schermerhorn*.⁶¹ In upholding the jurisdiction of a state to enforce its "right-to-work" law,⁶² the Court noted that the authority is narrow. For example, picketing to obtain a union-security agreement is within the exclusive jurisdiction of the NLRB even in states which prohibit the execution or application of such agreements.⁶³ The Court further stated that a state's regulatory authority "begins only with the actual negotiation and execution of the type of agreement described by § 14(b). Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*."⁶⁴ While *Schermerhorn II* does not directly address the state's authority to determine the appropriateness of a bargaining unit for union-security clause purposes, it does indicate that sec-

⁶⁰ 551 P.2d at 1079.

⁶¹ 375 U.S. 96 (1963) [hereinafter referred to as *Schermerhorn II*]; cf. *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 96 S. Ct. 2140, 2146 (1976).

⁶² Grodin & Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 CALIF. L. REV. 95, 106-13 (1964). The term "right-to-work" is often used to refer to those states which absolutely prohibit union-security agreements. A "modified right-to-work" state refers to a state, such as Colorado, that prohibits union-security agreements, but only when the required majority approval is not satisfied pursuant to a referendum.

⁶³ 375 U.S. at 105; accord, *Local 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 547-48 (1963). For a discussion of the problems created by the preemption of state jurisdiction under section 14(b) with respect to picketing see Comment, *Labor Law: Extent of State Power to Enforce Right-to-Work Laws*, 49 MINN. L. REV. 307 (1964); Comment, *Supreme Court Precludes Relief From Section 14(b) Picketing*, 17 STAN. L. REV. 158 (1964).

⁶⁴ 375 U.S. at 105 (emphasis in original).

tion 14(b) is a narrow cession of authority back to the states. Under the principle announced in *Schermerhorn II*, since negotiation of a union-security clause in Colorado cannot even properly begin prior to the determination of the appropriate unit or its agent,⁶⁵ Colorado's attempt to regulate unit determination would seem to fall outside the scope of jurisdiction granted to the state under section 14(b).

A final twist to the potential state-federal conflict presented by the Colorado Supreme Court's decision should be noted. There may be situations when an NLRB-conducted election would satisfy the CLPA's requirement that the appropriate unit be determined by a secret ballot. The CLPA defines elections as those conducted by the Colorado Division of Labor and "any other tribunal having competent jurisdiction."⁶⁶ Assuming that the NLRB has "competent jurisdiction" within the meaning of the CLPA, units which had been determined in an NLRB election could proceed to the union-security referendum. As noted earlier, however, the NLRB does not always conduct such elections.⁶⁷ Those units determined without an election could not proceed to the union-security referendum. Consequently, depending on the NLRB's method of unit determination, some, but not all, NLRB-determined units would be eligible to conduct the union-security authorization election.

The *Algoma* decision indicated that states may, pursuant to section 14(b), set up union-security referenda. However, it appears that the Colorado Supreme Court may have gone too far in adding an additional requirement that to be eligible to conduct the union-security referenda the appropriate bargaining unit must be determined in a CLPA-authorized election. The Colorado Supreme Court treated the unit determination election and the union-security referendum in the CLPA as an inseparable procedure. Two constitutional challenges to this process may be advanced: equal protection and preemption. It is arguably a denial of equal protection to allow those units determined by an election conducted by the NLRB to proceed with a union-security

⁶⁵ COLO. REV. STAT. § 8-3-108(1)(d) (1973). See *ILGWU v. NLRB*, 366 U.S. 731 (1961); *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).

⁶⁶ COLO. REV. STAT. § 8-3-104(10) (1973).

⁶⁷ See notes 13 and 50 *supra*.

referendum, while denying the same right to units determined by the Board without an election.⁶⁸

Preemption appears, however, to be a stronger argument. By its adoption of section 14(b), Congress clarified the authority of the states to be more restrictive in their regulation of union-security agreements than amended section 8(a)(3) of the same act. Under the Wagner Act, a union-security agreement could be negotiated by any recognized collective bargaining unit.⁶⁹ Section 8(a)(3)(ii) of the Taft-Hartley amendments allowed such agreements only after they had been authorized by a simple majority of all employees eligible to vote in a unit determination election.⁷⁰ Although the mandatory federal authorization election was abandoned in a 1951 amendment to the act,⁷¹ the 1947 amendments indicate a congressional desire to permit states to be more restric-

⁶⁸ Since this is an economic issue, the traditional equal protection "rational basis" test would most likely have been applied, considerably reducing the possibility of a successful challenge. *City of New Orleans v. Dukes*, 96 S. Ct. 2513 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970). The application of this test almost insures that an act will be upheld. *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Recognizing that this unforeseen and convoluted application of Colorado law could not have been intended by the state legislature, the Court, on the other hand, might have applied a "rational basis plus" test in examining the statute, a more stringent test than the traditional "rational basis" test. See Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-20 (1970). The Burger Court, however, has not used this test in examining economic legislation. *City of New Orleans v. Dukes*, 96 S. Ct. 2513 (1976). See Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1, 7-18; *Forum: Equal Protection and the Burger Court*, 2 HAST. CONST. L.Q. 645 (1975); cf. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

⁶⁹ Wagner Act, 29 U.S.C. § 158(a)(3) (1940) (amended 1947).

⁷⁰ Labor Management Relations Act, 1947, ch. 120, § 8(a)(3)(ii), 61 Stat. 136 (1947) (amending 29 U.S.C. § 158(a)(3) (1940)). Before this section was amended it brought about an unusual result in several instances:

In an election for the approval of a union-shop agreement, a majority of all eligible employees may vote in favor of such agreement, but this may be less than three-fourths of the employees actually voting, in which case the contract would be legal under Taft-Hartley, but illegal under the Colorado Act. In another case, three-fourths of the employees actually voting might vote affirmatively, but might not constitute a majority of all employees eligible to vote, in which case the contract would be legal under Colorado law but not under Taft-Hartley.

Hornbein, *The Extent to Which Taft-Hartley Has Superseded State Labor Laws*, 28 DICTA 47, 50 (1951) (footnote omitted).

⁷¹ National Labor Relations Act Amendments, ch. 534, § b, 65 Stat. 601 (1951).

tive of union-security agreements than the federal policy, if they so choose. Among the more restrictive state policies in force at the time section 14(b) was debated and of which Congress was aware were those statutes, such as the Colorado and Wisconsin acts, that required something more than the simple majority of the federal referendum provision governing union-security clauses. The more restrictive state policies permitted by section 14(b) might then be interpreted as being limited to the authorizing referendum. While Congress clearly intended to allow states to regulate union-security agreements in this fashion under section 14(b), nowhere in the legislative history does it appear that Congress wished to permit states to regulate unit determinations for union-security purposes.⁷³ Thus, section 14(b) should not be used to uphold this exception to the *Bethlehem Steel* holding that unit determinations are preempted from state authority.

In light of the Colorado Supreme Court's lack of authority for this exception, the United States Supreme Court's summary dismissal on appeal does little to clarify the extent of state powers under section 14(b). By holding that no substantial federal question was involved in *Communication Workers*—a somewhat surprising determination in light of the serious constitutional issues raised by the case—the Supreme Court leaves us to speculate on how the conflicts arguably resulting from the enforcement of the CLPA are to be reconciled with the preemption doctrine.⁷⁴

IV. THE POTENTIAL IMPACT OF *Communication Workers*

Colorado, by basing the referendum on the unit election requirement, may force unions to put pressure on the NLRB, as a tribunal of competent jurisdiction, to conduct unit determination

⁷³ H.R. REP. NO. 245, 80th Cong., 1st Sess. 34 (1947); 93 CONG. REC. 6665-66 (1947) (analysis of the bill by Senator Murray).

⁷⁴ While Congress was aware of the recent *Bethlehem Steel* decision, 330 U.S. 767 (1947), preempting unit determination, it made no attempt when considering section 14(b) to include within the section a statutory exception for unit determination for union-security purposes. SEN. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947).

⁷⁵ A number of attorneys familiar with *Communication Workers* feel that one explanation for this dismissal was that the Supreme Court accepted the appellee's contention that, since fragmentation or conflict of bargaining units had not yet actually occurred, the issue was not sufficiently ripe for review. Brief for Appellee Western Elec. Co. at 14-20, *Communication Workers v. Western Elec. Co.*, 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977). Another plausible explanation is the Court's reluctance to deal with this issue, in light of President Carter's support for the repeal of section 14(b).

elections so that those Colorado units can then proceed to the union-security election. This could inhibit the Board's discretion in the performance of its duties.⁷⁵

An additional problem is that the Colorado Division of Labor, which has the primary responsibility under the CLPA for conducting unit elections and referenda, does not have the capability to supervise the potential overload of elections which enforcement of *Communication Workers* might impose on it.⁷⁶ In 1975 the Division conducted only seven or eight unit determination elections, and only 27 union-security referenda.⁷⁷ Since 1943 there have been only 375 union shop referenda.⁷⁸ There are approximately 4,750 to 5,700 collective bargaining units in Colorado,⁷⁹ 95% of which have already been recognized or certified by the NLRB.⁸⁰ Many, if not most, of these units have not been determined by a CLPA unit election.⁸¹ Thus, a unit election would be required before a referendum could be held. And with the possibility of unit fragmentation as a result of the CLPA unit severance provisions, an even greater number of referenda might be necessary.

Since the Division is not currently capable of meeting such a dramatic increase in the demand for unit determination and union-security elections, the practical effect of this decision may be to frustrate employees and unions in their attempts to seek

⁷⁵ "As the political winds change and new members are appointed [to the Board] the unit decisions may show drastic turnabouts." J. ABODEELY, *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 13 (1971). By exercising its discretion as to whether or not to hold a unit election, the Board can, either directly or indirectly, affect which unit shall prevail. This, in turn, may determine the issue of union representation. *Id.* at 225, citing *Liberty Coach Co.*, 181 N.L.R.B. 182 (1970), where the bargaining unit found appropriate by the Board was determinative of the representative question. The Board's decision on unit appropriateness, and thus on unit elections, will determine whether a union representing that unit can ever obtain a legal union-security agreement.

⁷⁶ The Division of Labor has estimated that it might need between 20 and 50 more employees and between one and three million more dollars to conduct these elections. Carey, *Union 'security agreements' in jeopardy*, *Rocky Mountain News* (Denver), Feb. 7, 1977, at 6, col. 1.

⁷⁷ Second Frey Interview, *supra* note 17.

⁷⁸ Motion for stay of mandate by the defendant State of Colorado with attached affidavit at 1, 3-4, *Communication Workers v. Western Elec. Co.*, 551 P.2d 1065 (Colo. 1976) [hereinafter cited as Motion for stay].

⁷⁹ Second Frey Interview, *supra* note 17.

⁸⁰ Motion for stay, *supra* note 78.

⁸¹ Second Frey Interview, *supra* note 17.

unit and union-security elections. These elections have usually been conducted by the Colorado Division of Labor within two weeks of the request.⁸² A significant increase in the number of requests for these elections may create long delays during which time an employer might seek to discourage employees from voting for a union-security agreement⁸³ or to persuade employees to vote against the formation of a CLPA bargaining unit; or, in hopes of dividing union solidarity, the employer might seek to encourage craft fragmentation of the bargaining unit. The problems created by having a single NLRB unit for general collective bargaining purposes that encompasses several CLPA units for the specific purpose of the authorization referendum can only lead to confusion for employers, employees, and unions.

During the potential delays before elections, union funds derived from initiation fees and dues could drop significantly, since union-security provisions requiring such payments would not yet have been validated. Even though the union, which has been recognized as the exclusive bargaining agent by the NLRB, might be crippled financially, it will still be required under federal law to fairly represent *all* the employees in grievance, arbitration, and collective bargaining matters, regardless of whether the employees have tendered dues to that union.⁸⁴ Employees who are paying

⁸² First Frey Interview, *supra* note 46.

⁸³ Even if the director of the Division of Labor should find that the employer has committed an unfair labor practice by interfering with the employees' free choice in the referendum, there is some question as to whether an adequate remedy is available. If the referendum is still required to authorize a union-security clause, there appears to be little discouragement of employers from interfering with this right. COLO. REV. STAT. §§ 8-3-108(4) and 8-3-110(7) (1973).

⁸⁴ In *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), the Court stated:

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.

Id. at 255. See also Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 565-67 (1945). For a critique of this principle see Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975). It is this principle of exclusivity, with its concomitant requirement of fair representation of all employees in the unit, to which many point when supporting the concept of union security:

Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost."

for the union's services might be expected to put pressure on their fellow employees who are not. This pressure would probably be most pronounced in the many small units that predominate on the Colorado labor scene, since most employees would know each other, and therefore would know who was not contributing his or her fair share.

Unions, to insure their success in these elections which now become so vital to their financial strength, can be expected to expand their campaign activity among the employees. Rather than attempting to foster greater cooperation between labor and management, union activists may emphasize their conflicts with management in these campaigns in order to gain greater support from other employees.⁸⁵ It takes little imagination to see both that

S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947).

Section 8(a)(3) gives employers and employees who feel that union-security agreements promote stability by eliminating "free riders" the right to continue such arrangements.

Id. at 7.

For a comparison of the exclusive representation question in foreign countries see Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1425-30 (1970); Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFF. L. REV. 210 (1966).

⁸⁵ In criticizing the original Taft-Hartley majority referendum requirement to authorize union-security clauses, Archibald Cox pointed out the negative factors resulting from a referendum election requirement:

One disadvantage is the delay which will result in the negotiation of collective bargaining agreements. The election will have to be held before negotiations for the contract can be commenced and, even if the Board is able to expedite its processes, the election proceedings are likely to take a considerable period of time. A second disadvantage is the election campaign which will inevitably precede each ballot. Union leaders will be under heavy pressure to arouse the employees' enthusiasm for strengthening their organization against the employer; and any competing union in the plant, if not the employer himself, will be tempted to campaign against the union. Such a period builds up intense emotions; friction develops and production is slowed. Nor is it easy to resume normal relationships. In newly organized plants the problem will be especially difficult for, instead of the period of readjustment which should follow the selection of a collective bargaining representative, there will come renewed conflict over the union shop.

Moreover, the execution of the initial union shop contract may not always mark the end of the struggle. Section 9(e)(2), by providing for votes as often as once a year upon petition of 30% of the employees, holds out the constant hope that the union's authority may be subsequently curtailed. Thus, each annual bargaining conference will be conducted under the threat of being suddenly interrupted by the filing of a petition and the subsequent turmoil of an election campaign.

this situation could produce the very industrial confusion and strife which the National Labor Relations Act was designed to minimize and that the United States Supreme Court should have more closely considered these issues.

CONCLUSION

Algoma supports Colorado's regulation of union-security clauses by the referendum vehicle. *Bethlehem Steel* holds that Colorado's power to determine appropriate units for general purposes of collective bargaining has been preempted by federal legislation. Determination of the representative agent is also within the sole responsibility of the NLRB. *Schermerhorn II* and the legislative history of section 14(b)⁸⁶ indicate that the scope of authority granted to the states by this section should be narrowly construed and should not be extended to encompass unit determination for the specific purpose of conducting union-security referenda. The United States Supreme Court's handling of the case, in effect affirming *Communication Workers*, requires speculation as to why the Court found no substantial federal question. If, and when, actual conflict does occur between federal and state policy on unit determination, a closer scrutiny by the Court of these issues seems justified.

The Colorado Supreme Court, by interpreting the CLPA as mandating a unit election as a necessary prerequisite to a union-security referendum, may have so entangled these two requirements that the entire unit and referendum procedure might have fallen had the United States Supreme Court struck down the unit election provision.⁸⁷ Had this occurred, employers and employees could have freely negotiated union-security agreements absent an authorizing referendum under section 8(a)(3) of the National Labor Relations Act.⁸⁸ The Colorado Legislature, however, could have reinstituted the authorization referendum requirement by simply amending the CLPA, so that such a referendum could be

Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 298 (1948) (footnotes omitted).

⁸⁶ See note 37 *supra*.

⁸⁷ Another alternative is that had the United States Supreme Court struck down the CLPA unit election requirement a remand to the state court of *Communication Workers* could have been ordered for a determination of the severability of the unit and referendum requirements.

⁸⁸ 29 U.S.C. § 158(a)(3) (1970).

conducted in that portion of any NLRB-recognized unit contained within Colorado, whether determined by an election or otherwise.

In light of the low number of state referenda conducted in the past, and the high rate of approval for union-shop agreements in these elections, elimination of the referendum is the most logical, economical, and administratively manageable alternative.⁸⁹ Employee input into the union-security issue would be preserved. The employees can seek to influence the type, if any, of union-security clauses negotiated through their normal union channels. More importantly, employees can force the federal Board, by petition of 30% of the employees,⁹⁰ to conduct a deauthorizing referendum which would rescind a union-security clause.⁹¹ While the authorizing referendum conducted by Colorado, which

⁸⁹ From 1945 to 1960 the Industrial Commission (which supervised Colorado labor election procedures before this responsibility was transferred to the Division of Labor) conducted only 347 all-union referenda, of which the union won 314. H. SELIGSON & G. BARDWELL, *LABOR-MANAGEMENT RELATIONS IN COLORADO* 147 (1969). This high rate of approval involves union-shop agreements—the most stringent form of union-security clause now permitted. Even higher rates of approval might be expected in referenda conducted for lesser or modified union-security agreements, such as a maintenance-of-membership clause. Seligson and Bardwell also point out that the Industrial Commission “conduct[ed] all-union elections in collective bargaining units which have been certified in representative elections conducted by the National Labor Relations Board.” *Id.* at 146. The Division of Labor has followed this procedure. Second Frey Interview, *supra* note 17.

Wisconsin, which also has a referendum requirement, has had similar experiences. The unions there have won all-union referenda about 87% of the time. G. HAFERBECKER, *WISCONSIN LABOR LAWS* 168 (1958). This probably understates the number of union-security clauses agreed to in Wisconsin, since “[i]t is obvious that a large number of all-union agreements have been executed in defiance of the statutory provisions.” *Id.* at 168, quoting [1941-1942] *WISCONSIN EMPLOYMENT RELATIONS BD. ANN. REP.* 8. This defiance is interesting in light of the Wisconsin Employment Relations Board's opinion in Mathie-Ruder Brewing Co., Dec. No. 1506 (1948), cited in Comment, *A Study of the Wisconsin Employment Peace Act—Part II—Union Security*, 1956 *WIS. L. REV.* 481, 487-88. This comment points out that “the mere inclusion in a collective bargaining agreement of an unauthorized ‘all-union’ clause is a violation of the Act.”

Since over 90% of the unions in Colorado have negotiated some form of union-security clauses, and few referenda have been held, First Frey Interview, *supra* note 46, it appears that Colorado employers, as well as Wisconsin employers, have been willing to agree to all-union contracts without referenda. The federal referendum requirement was dropped in 1951 because of the high cost of holding these elections, as well as the high rate of union-security clause approvals. H.R. REP. NO. 1082, 82d Cong., 1st Sess. (1951); 1949 NLRB ANN. REP. 6.

⁹⁰ 29 U.S.C. § 159(e) (1970).

⁹¹ 29 U.S.C. § 158(a)(3)(ii) (1970). A majority of the employees eligible to vote is required to rescind the union-security clause.

usually results in approval of the union-security clause anyway, would not then be mandated by the state, the deauthorizing referendum conducted by the NLRB would still be available upon petition to provide similar protection of employee rights. The additional and unnecessary time and expense to the State of Colorado would be avoided, along with all the potential confusion accompanying these elections.

Legislative elimination of Colorado's union-security authorization referendum,⁹² either by the state⁹³ or by congressional repeal of section 14(b), would merely legitimize the traditional practice in Colorado of negotiating and executing such agreements absent a referendum,⁹⁴ and thereby reinstate the status quo prior to *Communication Workers*.

August Randall Vehar

⁹² For a discussion of the policy considerations and controversy surrounding union-security agreements see Dempsey, *The Right-to-Work Controversy*, 16 LAB. L.J. 387 (1965); McDermott, *Union Security and Right-to-Work Law*, 16 LAB. L.J. 667 (1965); Niebank, *In Defense of Right-to-Work Laws*, 8 LAB. L.J. 459 (1957); Toner, *There's No Defense of Right-to-Work Laws*, 9 LAB. L.J. 566 (1958); Warshal, "Right-to-Work," *Pro and Con*, 17 LAB. L.J. 131 (1966).

For a survey of right-to-work laws in other states see Morgan, *Right-to-Work Laws: The Current State of Affairs*, 23 CASE W. RES. L. REV. 570 (1972). For problems created by these laws see Eissinger, *The Right-to-Work Imbroglia*, 51 N. DAK. L. REV. 571 (1975).

⁹³ In the one instance where the people of Colorado were able to render a direct opinion on this issue, they overwhelmingly rejected a proposal to make Colorado a "right-to-work" state and prohibit all union-security agreements by a vote of 318,480 to 200,319. Proposed Constitutional Amendment No. 5, An Act to Amend Article II of the State Constitution Providing that Membership in Any Labor Union or Organization Shall Not Be Required as a Condition to Obtain or Retain Employment, Nov. 4, 1958. On file with the Colorado Legislative Council, Colorado State Capitol, Denver, Colorado.

⁹⁴ See note 89 *supra*.